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No. 98-370

In The

Supreme Court of the United States

October Term, 1998

SEAGATE TECHNOLOGY, INC.,

Petitioner,

vs.

MAUDIE BEAIRD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In October, 1993, the Petitioner decided to reduce its workforce. Seagate had a written Reduction In Force policy under which reductions would be determined by operational needs, performance, potential and, if those were equal, seniority. In the case of these Respondents, some of Seagate's managers used the opportunity to eliminate employees not because of operational needs but because of internal biases arising from the age, race or gender of the employees.

These individual discriminatory actions gave rise to a small number of lawsuits with most claims being dismissed by the trial judge who improperly — as evidenced by the Court of Appeals decision — weighed the evidence and disregarded competent evidence.

The result of the appeal is that the claims of seven litigants were remanded for trial and summary judgment as to one litigant (Ms. Beaird) was affirmed.

Each of these plaintiffs proved a prima facie case and presented evidence that the employer's explanation was pretextual in the sense that the explanation was disproved leaving a proper inference of discrimination.

In the case of Ruth Noran, there was evidence

> that Seagate improperly manipulated her final . . . performance evaluation . . . in order to ensure that she would be terminated. Under the RIF criteria, had Noran's 240 point score stood unaltered, she would have had a . . . score of three and been retained.

Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1169 (10th Cir. 1998).

> [M]ore than two months after Seagate claims to have completed the 180-point/grade two performance evaluation that ostensibly led to Noran's termination, the company was describing her on internal documents as having 240 points.

Id.

Rosa Clark "established a sufficient basis to find the differentiation of job codes 1433 and 1432 pretextual", *id.* at 1172, and "[t]here is no shortage of" "retained employees in job code 1432 who [are] younger than she, less senior, and rated as a three". *Id.*

In the case of Ms. Bobo, Ms. Bush and Ms. Johnson, "all three can legitimately establish age and race discrimination by pointing to younger, white employees retained in job code 1432." *Id.* "In addition, Johnson establishes pretext by raising the inference that her final [score] may have been manipulated". *Id.* A document

> dated July 13, 1993, which is *after* the claimed date of her final . . . evaluation . . . . lists Johnson's "Last Performance Rating," dating from December 28, 1992, as a four, and states that Johnson has since "continued to perform at the same rating level."

Id. The Circuit properly found this discrepancy "shocking". *Id.*

Ms. Jones showed that Seagate deviated from its written selection criteria by not considering potential and "[t]hat deviation disadvantaged Jones because, as a three-performer with potential . . . she would not have been laid-off". *Id.* at 1173. Jones also presented evidence which "raises the inference that Jones achieved a four rating that was suppressed for purposes of including her in the RIF." *Id.* at 1174.

Finally, Mr. Henson presented evidence "that Seagate was hiring into positions similar to Henson's at the very time it claimed the elimination of positions such as Henson's was operationally required." *Id.* at 1174.

This evidence of pretext was consistent with efforts to weed out employees because of age, race or gender — the claims that these plaintiffs raised — and it did not point to any other non-discriminatory explanation. Indeed, the panel was unanimous that the evidence as to six of those seven plaintiffs satisfied even the pretext-plus standard advanced by Judge Tacha. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1175 (10th Cir.1998) (Tacha, J., concurring in part, dissenting in part) ("I concur in the judgment, except with respect to Plaintiff Ruth Noran.").

As a consequence, Petitioner is seeking review of an interlocutory order (one merely denying summary judgment) in a case where, even if Petitioner's theory were accepted, the result would not change for at least six of the seven litigants.[1]

With this background in mind, Respondents will show the writ should be denied.

SUMMARY OF THE ARGUMENT

Petitioner and Amicus urge that there is a "clear split" in authority among the Circuits as to "the appropriate standard for summary judgment in disparate treatment employment discrimination cases." Brief of Amicus, pg 2.

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1. At most there is the *possibility* that one of the other two judges would agree that Ms. Noran did not meet a pretext-plus standard. It is more likely, however, that the other Judges would hold that Mr. Noran's case — like the other six — was sufficient regardless of the standard applied.

This is, however, neither the issue presented for review nor an accurate statement of the law in the Circuits.

Petitioner has propounded only one question for review:

> Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?

Petitioner has not asked this Court to determine or refine the summary judgment standard to be used in employment cases, but has only asked whether summary judgment is possible "despite a showing of pretext". Petition, **QUESTION PRESENTED FOR REVIEW**.

As the Tenth Circuit already recognizes that summary judgment may be entered "despite a showing of pretext", even an affirmative answer to that question will not affect the decision below nor modify the Circuit's existing rule and will not affect the Court's opinion as to these Respondents.

Because the question posed is inadequately defined, any answer would be only hypothetical and not affect the merits of the decision. Further, because the question is not sufficiently refined, the Petition presents issues which are not beyond the scope of the question thus leaving this Court with uncertainty about what issues will actually be presented and argued if certiorari is granted. Finally, the Petitioner and Amicus have not properly examined the rule of the Circuit Courts in the context of the question posed and therefore present a claimed "inter-circuit split" which is, in fact, illusory. Reviewing this decision would, therefore, be a waste of this Court's precious and limited resources.

REASONS FOR DENYING THE WRIT

There are a number of compelling reasons for denying the proposed writ. These reasons include:

A. The lack of a clear inter-circuit conflict,

B. The waste of this Court's resources; and

C. The correctness of the Tenth Circuit position in light of this Court's precedent.

It should also be pointed out that as to one of the Petitioner's grounds for review — D. — Context Evidence/Amplified Concerns In RIF Situations — this ground does not relate to the sole question submitted for review.

Respondents will address each of these reasons in turn.

A.

THE CLAIMED INTER-CIRCUIT CONFLICT IS ILLUSORY

Petitioner poses only one question:

> Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?

This question, however, is not the subject of the arguments advanced by either Amicus or the Petitioner. Rather, the Amicus and Petitioner argue the existence of an inter-circuit conflict on a different issue: what kind of pretext evidence is necessary to preclude summary judgment. Even as to this, the arguments do not make it clear whether the Petitioner and Amicus believe a

"pretext-plus" doctrine should be imposed, whether it is sufficient that the evidence of pretext point toward discrimination or whether it is enough if the evidence of pretext merely is not inconsistent with discrimination.

Because Petitioner does not adequately identify the issue which this Court should decide, neither their analysis of the purported inter-circuit conflict nor their arguments addressing the legal issues are consistent. Respondent would suggest that this lack of precision in formulating the question strongly counsels that this is not the right case for certiorari. This Court should neither be put to the task of sorting through the arguments to determine what the real issues are nor to be asked to determine post hac what question this Court will decide.

Nonetheless, even if the question is deemed adequately framed, there is no real split among the circuits.

In substance the circuits have uniformly adopted a rule of permissive pretext-only in which a showing of pretext following the prima facie case may be sufficient to prove discrimination but does not require a finding of discrimination. The ultimate fact determination of whether discrimination is proven is a matter which is reviewed, as is any other fact finding, for clear error. Thus, the determination of discrimination which flows from pretext must be rational and must be supported by more than a scintilla of evidence.

This underlying rationale is followed regardless of the differing terminology and thus presents no split among the circuits requiring resolution by this Court.

Because so much of the argument is over semantics, Respondent would initially clarify the terms used. Properly defined, the "pretext-only" doctrine "simply requires that a plaintiff prove

that the defendant's proffered reason is pretextual. Once this is proven, the plaintiff is entitled to judgment as a matter of law." *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343 (6th Cir. 1997). "Permissive pretext-only" is an analysis where "if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but not required, to enter judgment for the plaintiff." *Id.*

> Under the "pretext plus" strand of analysis, a plaintiff acquires an additional burden. The plaintiff must not only demonstrate that the employer's reasons were pretextual, but the plaintiff must also introduce additional evidence of discrimination.

Id.

This Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 197 (1993) sought to eliminate this confusion by adopting the "permissive pretext only" standard and, indeed, the Circuits are now in remarkable accord that this is the standard to be followed.

Contrary to the arguments of Petitioner and Amicus, all en banc decisions of the Circuits follow the "permissive pretext-only" standard. Even those few circuits which have, in dicta, appeared to embrace pretext-plus actually hold to a "permissive pretext-only" requirement because they do not actually require evidence beyond that used to prove the prima facie case and to disprove the employer's explanation. Several circuits have surveyed these standards and noted the general agreement of the courts. *See Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert denied*, 118 S. Ct. 685 (1998):

> [I]n considering whether the [permissive pretext only] rule established in our precedents "ought to be the law", it is of no small moment that eight of

> the ten other circuits that have considered the question are in agreement with our interpretation of *Hicks*. Thus far, only the First and Fifth Circuit have issued opinions expressing a contrary view, and in neither opinion was that expression actually a holding.
>
> * * *
>
> The fact remains that the contrary dicta in the First and Fifth Circuit decisions are just that: dicta . . .

106 F.3d at 1536.

The Third Circuit in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc) also surveyed the state of law on this subject and found consensus among the holdings of the D.C. Circuit, the Second Circuit, the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, and the Ninth Circuit.

The Eighth Circuit in *Ryther v. KARE 11*, 108 F.3d 832, 837 n.3 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997) expressed agreement with Sheridan's compilation and with the inclusion of the Eighth Circuit in the permissive pretext-only group.

Indeed, those Circuits which, in dicta, nominally adopted a "pretext-plus" approach actually do not mandate evidence beyond the prima facie case and pretext; they only require that the totality of the evidence be sufficient to warrant the underlying determination of discrimination. For instance the First Circuit, which is listed as a "pretext-plus" jurisdiction explains that its " 'pretext plus' approach does not necessarily require the introduction of additional evidence." *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir.1998).

> [I]f the plaintiff establishes that the defendant's proffered reasons for the adverse employment actions are not the true reasons, the trier of fact may, depending on the overall evidence, but is not required, to infer that intentional age-based discrimination was a determinative factor.

Kelley v. Airborne Freight Corp., 140 F.3d 335, 348 (1st Cir. 1998). Similarly, the Fourth Circuit[2] explains that under its "pretext-plus" approach "establishing a prima facie case and raising factual issues regarding the employer's reasons may permit a factfinder to infer the ultimate fact of age discrimination." *Thomas v. Randolph Hills Nursing Center*, 155 F.3d 561 (4th Cir. 1998) (Table) (unpublished), 1998 WL 454088 at **2.[3] The Fifth Circuit holds that "evidence of pretext will permit a trier of fact to infer that the discrimination was intentional". *Rhodes v. Guibertson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), *cert. denied*, 502 U.S. 868 (1997).

In short, even the First, Fourth and Fifth Circuits apparently recognize the "permissive pretext-only" standard but merely

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2. The Fourth Circuit had been considered to follow a permissive pretext-only rule as set out in *Combs v. Plantation Patterns*, 106 F.3d at 1536, *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc) and *Ryther v. KARE 11*, 108 F.3d 832, 837 n.3 (8th Cir.), *cert. denied*,117 S. Ct. 2510 (1997). Since the Fourth Circuit has not yet addressed the issue en banc it would be inappropriate to assume that it has abandoned its prior precedents.

3. Petitioner had relied primarily on *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997) but both the holding and the reasoning of *Isenbergh* have been specifically repudiated within the Eleventh Circuit. *See Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert denied*, 118 S. Ct. 685 (1998) and *Arrington v. Cobb County*, 139 F.3d 865, 875 n.21 (11th Cir. 1998).

choose to label their tests in such a way which emphasized that the inference of intentional discrimination must be rational rather than automatic. A difference in semantics, however, is not a difference in substance.

For there to be a substantive split in the Circuits it would have to be shown that proof of pretext automatically translated into proof of discrimination. No Circuit since *Hicks* has gone so far. All circuits appear to recognize that the inference of discrimination arising from pretext is permissive, not automatic, and that — at least in some circumstances — evidence of pretext will not preclude summary judgment.

This understanding is crucial in the context of Petitioner's sole question: "Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?"

The Tenth Circuit already recognizes that "despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage". *See Randle v. City of Aurora*, 69 F.3d 441, 451 n.14 (10th Cir. 1995):

> Of course, in the unlikely event that the plaintiff concedes that the real, albeit concealed reason for the employment decision was a motive that itself is not prohibited under the civil rights laws, that plaintiff would remain vulnerable to summary judgment because the plaintiff's concession of a lawful motive would take the issue of motive from the jury and preclude the inference of a discriminatory motive that the jury could otherwise draw from the fact of pretext. For example, if a defendant stated that the plaintiff was fired for unexcused absences and the plaintiff offered

> evidence that the reason was pretextual and contended instead that he or she was really fired because the boss wanted to make that job available to his or her spouse, the defendant would be entitled to summary judgment because of plaintiff's concession that the true reason was not a prohibited discriminatory reason, even if it was concealed. . .

Accord Marx v. Schnuck Markets, Inc., 76 F.3d 324, 328 (10th Cir. 1996) ("if a civil rights plaintiff concedes that the real reason for the employer's action was a motive not prohibited under the civil rights laws, such a concession mandates granting summary judgment to the employer").

The recognition that some proofs of pretext may be inconsistent with proof of intentional discrimination is the common rule[4] and it has already been answered in the Tenth Circuit in the manner Petitioner urges. It may be that Petitioner believes that the Tenth Circuit's application of this rule on summary judgment is too restrictive and that some other rule should apply, ie: that proof of pretext should be required to point specifically toward

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4. *Cf. Aka v. Washington Hospital Center*, __ F.3d __ (D.C. Cir. 1998) 1998 WL 698396, *9 (en banc) (reaffirming commitment to permissive pretext-only but noting that "the plaintiff cannot always avoid summary judgment by showing the employer's explanation to be false"); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997) (en banc), *cert. denied*, __ U.S. __, 118 S. Ct. 851 (1998) ("evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's reason may — or may not — be sufficient to show illegal discrimination"); *Ryther*, 108 F.3d 832, 837 n. 2 ("there may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination."), and *Rhodes v. Guibertson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), *cert. denied*, 502 U.S. 868 (1997) ("We are convinced that ordinarily such verdicts [based on proof of pretext] would be supported by sufficient evidence, but not always.").

discrimination in order to avoid summary judgment or possibly that some additional proof beyond pretext should be required. The Petition, however, does not pose such questions, analyze whether the Circuits are split on such issues nor even explain why the minutia of such treatment in the weight accorded pretext would warrant the consideration of this Court.

WHEREFORE, an illusory inter-circuit conflict and an inadequately framed question do not warrant the granting of certiorari.

B.

THE WASTE OF THE COURT'S RESOURCES

The factual posture of this case and the nature of the question presented do not provide an appropriate vehicle to consider the question Petitioner seeks to advance.

As has already been pointed out, the answering of the broad question posed by Petitioner would do nothing to affect the resolution of this case. The Tenth Circuit already agrees that proof of pretext does not always preclude entry of summary judgment. Therefore granting certiorari and stating that pretext does not automatically prevent imposition of summary judgment would not change the rule in the Tenth Circuit nor the outcome of this case.

Even had the Petitioner urged a different question — that proof of pretext must also point in the direction of discrimination to preclude summary judgment — answering that different question would not change the underlying outcome.

The dissenting Judge Tacha espoused a standard under which pretext should also point toward discrimination, but even she agreed that all litigants except Ruth Noran had met the standard

she proposed. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1175 (10th Cir. 1998) (Tacha, J., concurring in part, dissenting in part) ("I concur in the judgment, except with respect to Plaintiff Ruth Noran."). Even as to the seventh Respondent (Ms. Noran), it is uncertain whether an affirmative answer to Petitioner's question would change the view of the other two judges because the majority believed the evidence of pretext could fairly be interpreted as a deliberate manipulation of her rating designed to secure her termination.

Consequently, Petitioner would have this Court expend its resources to decide a question which will not affect the outcome of the litigation in a context where the facts have not been fully litigated or the issues clarified by trial.

Should Petitioner's question even be worthy of review, the appropriate vehicle for review ought to necessarily be a terminal order — one affirming summary judgment — rather than an interlocutory order which merely denies judgment and allows the case to proceed to trial. At this non-final stage of the proceedings the Court would be acting on an incomplete record and would be acting contrary to this Court's long-standing recognition that a judge "may [always] deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Perhaps the clearest example of why the record and issues are not properly developed for review lies in examining the primary fact scenario advanced by Petitioner as the example of the "harm" inherent in the permissive pretext-only rule. Petitioner asserts:

> An example of this [supposed evil] is found in *Beaird*, 145 F.3d at 166 n.3, 1175. The majority notes that Seagate's explanation for terminating one respondent was because he was the only employee

> in his job code that received a "two" rating on his last performance evaluation, which was the lowest rating in that job code. *Id.* In other words, Seagate' explanation for terminating him was because his job performance was the least satisfactory of any employee in his job code. *Id.* However, the majority held that the employee insisted "that his work was satisfactory . . . which was sufficient to satisfy this element of the prima facie case." *Id.* at 1166 n. 3. Thus, the employee created a genuine issue of material fact simply by disputing perceptions about the quality of his work recorded on a previous performance appraisal. The employee disputes Seagate's explanation, so he gets to proceed to a jury trial.

Petition for Certiorari, pg 9.

The above is neither a correct statement of the facts of the case, the Circuit's holding nor even of the issue advanced for review.

Mr. Henson's perceptions of his work had nothing to do with the pretext analysis. Rather pretext was established because as to Henson's job code, the legitimacy of the supposed reduction itself was called into question. This was explained by Judge Tacha who urged the pretext-plus standard which Petitioner proposes, and who also explained that as to Mr. Henson the pretext-plus standard was satisfied:

> . . . Plaintiff William Henson was terminated from job code 276X, along with eight other employees. Henson established a prima facie case of discrimination. Defendant proffered as its nondiscriminatory reason for the lay-off that

> operational requirements dictated a reduction of nine employees in that job code. Then, Henson presented evidence that immediately prior to and during the lay-off, Seagate was advertising for four open positions in the same job code. On these facts, there is sufficient evidence to disbelieve Seagate's proffered reason for the lay-off. Henson has established pretext. Furthermore, at the time of the layoff, Henson was 52 years old. Of the other eight employees that Seagate terminated, four were over 40 years old. Because several of the terminated employees were above age 40, the pretext evidence and its surrounding context are such that a juror could reasonably infer that age was a determinative factor in Seagate's employment decision. Thus, the additional facts help to create a genuine issue of material fact about whether Seagate illegally discriminated against Henson. The question should go to the jury, which will make the ultimate decision whether or not to draw an inference of illegal discrimination.

Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1178 (10th Cir. 1998) (Tacha, J., concurring in part, dissenting in part).

The complaint which Petitioner advances, is one that goes to the prima facie case. Apparently Petitioner believes that an employee's testimony as to his or her level of performance should be not be sufficient to establish a prima facie case.[5] Petitioner,

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5. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1166 n.3 (10th Cir.1998). The Tenth Circuit "follow[s] [the] majority of circuits that have 'refus[ed] to consider a defendant's proffered reasons for discharge in assessing the existence of prima facie case' ". *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005 n. 8 (10th Cir. 1996) (quoting *McDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1119 (10th Cir. 1991)).

however, does not propose review of the Circuit's prima facie formulation. Indeed, Petitioner does not even challenge that formulation let alone assert that there is a circuit split on the matter or that the standard used is contrary to the precedent of this Court. Thus, answering the question posed would not affect the fact scenario actually faced by the Circuit nor would it address the "evil" propounded by the Petitioner.

Again, this emphasizes that by accepting certiorari this Court would be presented with a host of arguments not related to the question advanced.

This Court's time and resources are limited. This Court should limit its inquiry to matters which have been carefully and accurately delineated and which arise in factual context sufficiently developed to allow for accurate determination. Those resources should not be wasted on a Petition wherein the Petitioner advances arguments and scenarios which are unrelated to the sole question posed for review.

WHEREFORE, the Petition should be denied.

C.

BEAIRD IS CORRECT ON THE MERITS

In parts (B) and (C) of its Petition, Petitioner asserts that the Tenth Circuit's permissive pretext-only rule automatically defeats summary judgment and that this is contrary to established precedent. As pointed out, this assertion is not correct because the Tenth Circuit recognizes that proof of pretext may, in some cases, be inconsistent with the ultimate proof of discrimination such that summary judgment will be appropriate.

Nonetheless, that a prima facie coupled with pretext will normally suffice to present a triable issue is certainly neither novel nor in conflict with this Court's precedent.

Denying summary judgment when the evidence of the employer's intent is in conflict is not novel, unsettled or contrary to prior law; it is the normal rule of summary judgment applicable in every case.

> [I]t is clear enough. . . that at the summary judgment stage the judge's function is not himself to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As this Court further stated, Rule 56, Fed. R. Civ. P:

> by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when] ruling on a motion for summary judgment . . .

Id. 477 U.S. at 255.

When the employer proffers a non-discriminatory explanation for its actions, which is shown to be false it will ordinarily be rational to infer an unlawful motive.

> An employer who concocts a false explanation for an employment decision is in a like position to a criminal defendant who offers a false alibi: the jury may consider the fact that the defendant has presented a false alibi in deciding his guilt.

Aka v. Washington Hospital Center, supra, __ F.3d at __, 1998 WL 698396 at *10.

> . . . *Hicks* also made plain that a lie "carries substantial risks", including the risk of sanctions, *Hicks*, 509 U.S. at 521-22, 113 S.Ct. 2742, and the more mundane risk that the lie will lead the jury to draw an adverse inference. Indeed, the employer's fear that the jury will draw an adverse inference from a false explanation is a vital element of the *McDonnell-Douglas* burden-shifting procedure. Without it, employer's would have little incentive to look for and present the real reasons for their employment decisions, undercutting the purpose of the *McDonnell-Douglas* framework, which is "to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). . .

Indeed, the drawing of inferences of guilt or guilty knowledge from the giving of a false explanation is one of the oldest and most settled tenants of evidence. *See Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946) (false exculpatory statement "has always been considered as evidence of guilt.").

Juries are routinely instructed that dissembling by a party may properly be considered as proof of guilt. *See* 1 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 15.06; 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 7.01 (Instruction 7-19) (if witness testifies untruthfully, jury may disbelieve all other portions); 1 Devitt, et al., § 14.08; 1 Sand et al., ¶ 6.05 (Instruction 6-9) (flight from scene of crime may be considered evidence of guilt); 1 Sand, et al., ¶ 6.05 (Instruction 6-10) (use of a false name); 1 Sand, et al., ¶ 6.05 (Instruction 6-12) (fabrication of an alibi); 1 Devitt, et al., § 14.07 (falsification of evidence); 1 Sand, et al. ¶ 6.05 (Instruction 6-14) and 1 Devitt, et al, § 14.07 and 1 Sand, et al., ¶ 6.05 (Instruction 6-16) (intimidation of witnesses), and 1

Sand, et al., ¶ 6.06 (Instruction 6-19) (engaging in clandestine behavior).

It is therefore merely an application of the ordinary rules of evidence that juries are instructed that dissembling by employers allows, but does not require, an inference that the employer acted from an unlawful motive. *See* 3 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 104.04 (1987); 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 87.01 (Instruction 87-27) (1996) (a jury may infer discriminatory motive from the consciousness of guilt reflected by dishonest statements about an adverse employment action).

Indeed, Petitioner has offered no authority suggesting that it is either novel or contrary to precedent to deny summary judgment for an employer who has made a false explanation and to, instead, allow the jury to "decide which party's explanation of the employer's motivation it believes." *U.S. Postal Service Bd of Govs v. Aikens*, 460 U.S. 711, 716 (1983).

WHEREFORE, the Petition for a Writ should be denied because the Tenth Circuit's standard is neither a novel nor unsettled point nor one which runs contrary to the precedent of this Court.

D.

SPECIAL RIF CONCERNS

Petitioner's argument in Part (D), Petition, pg 15-17, is puzzling because it again appears to be addressed to a matter outside the scope of the proposed question. Part (D) appears to assert that there should be a special summary judgment rule applicable to RIF settings, however Petitioner does not propose this as a separate question for review. Petitioner does not suggest that there is an inter-circuit conflict on this issue, does not argue

that the *Beaird* decision conflicts with this Court's precedent and does not even argue that the matter is a novel or unsettled issue. Indeed, Petitioner does not even define the particular question related to "special RIF concerns" it would have this Court address.

Rather Petitioner merely makes general arguments that in a RIF setting the employer's over-all pattern of conducting terminations should be capable of sustaining summary judgment. Although Petitioner disagrees with the Tenth Circuit's holding that such evidence is not conclusive, Petitioner seems to acknowledge that such is exactly what this Court has previously ruled, ie: that the favorable treatment of other employees in the protected class cannot be a conclusive defense to a claim of individual discrimination. *See Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous."[6]); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer for liability for special acts of discrimination.") and *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.").

Since Petitioner does not argue that the *Beaird* treatment of such "statistics"[7] conflicts with this Court's precedent cited above

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6. Paraphrasing is from *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

7. Respondents are leery of classifying the proffered evidence as "statistical" because the evidence does not take into account any relevant variables nor was it compiled in accordance with any statistical norms. The Circuit merely found it unnecessary to consider these deficiencies because, even if accepted, the Petitioner's proffer was not dispositive.

or the precedent of any other circuit, Petitioner has advanced no basis under the rules of this Court for addressing the issue even were it within the scope of the sole question presented for review.

WHEREFORE, this argument neither supports granting review on the proposed question nor sets out a separately reviewable issue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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